Supreme Court U.S.
FILED
SEP 15 2003
OFFICE OF THE CLERK

No. 03-176

In The Supreme Court of the United States

ROY A. COOPER, III, *et al.*,

Petitioners,

v.

R. DANIEL BOYCE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents Boyce & Isley, PLLC and its four attorneys filed the instant action against Petitioners based on Petitioners' campaign advertisements in the North Carolina Attorney General's race that defamed Respondent Boyce & Isley, PLLC and its member attorneys. The trial court dismissed the Complaint pursuant to Rule 12(b)(6). The North Carolina Court of Appeals reversed, holding that the well-pleaded allegations of the Complaint (admitted by Petitioners) state valid causes of action for libel and slander *per se* and unfair and deceptive trade practices. The North Carolina Court of Appeals' opinion is consistent with the First Amendment, in that Petitioners intentionally lied about Respondents' law firm and its members. The Supreme Court of North Carolina denied review and remanded to the trail court. Discovery proceedings are now under way. Therefore, the proceedings below should not be disturbed.

PARTIES TO THE PROCEEDING

Respondents to this case are Boyce & Isley, PLLC, Eugene Boyce, R. Daniel Boyce, Philip Isley and Laura B. Isley. Petitioners are Roy A. Cooper, III, the Cooper Committee, Julia White, Stephen Bryant and Kristi Hyman.

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PERCEIVED MISSTATEMENT OF FACTS IN PETITION

This case is in the earliest, interlocutory stage of a civil proceeding. Answer to the Complaint was only recently filed on 22 May 2003. Petitioners' Interrogatory responses and responses to Requests for Admissions were submitted on 29 August 2003. The trial court has ordered production of documents for 23 September 2003. Respondents will begin oral depositions just a few days later. A request is pending for jury trial in early to mid 2004.

Petitioners' caption, though appropriately reversing the parties, is misleading in that it does not state the actual caption as pleaded in the Complaint.[1] Moreover, it appears designed to convey to this Court an inaccurate introduction, *i.e.*, that this action is only between two political opponents. The true gravamen of the Complaint is Petitioners' defamatory statements toward Respondents Eugene Boyce, Philip R. Isley, Laura B. Isley, and their law firm, Respondent Boyce & Isley, PLLC. Petitioners made a late-hour, desperate campaign commercial attacking their opponent Respondent Dan Boyce (the television commercial at issue is hereinafter referred to as the "attack ad"). The real injury was not what candidate Roy Cooper said about candidate Dan Boyce, but was Petitioners' outright misrepresentations that a law firm and its members charge gross and unethical fees to the taxpayers of North Carolina. It was Respondent Dan Boyce who was

[1] The caption of the Complaint reads: "Boyce & Isley, PLLC, Eugene Boyce, R. Daniel Boyce, Philip R. Isley, Laura B. Isley v. Roy A. Cooper, III, The Cooper Committee, Julia White, Stephen Bryant and Kristi Hyman."

the Republican candidate and political opponent in the 2000 election for the office of Attorney General. Neither Eugene Boyce, Philip R. Isley, Laura B. Isley nor Boyce & Isley, PLLC was the political opponent of Petitioner Cooper.

In addition, Petitioners cleverly seek to divert the Courts' attention by omitting the actual defamatory language from their Statement of Facts that is the crux of this matter. (See Petitioners' statement of the "relevant part" (Pet. 3) and compare it with the true text of the attack ad viewed by over one million people in three States. (Pet. App. 33a).

There is no final judgment in this case. The only facts before the state courts, which are, or at least should be, the only relevant facts in this Court, are the material and well-pleaded allegations of the Complaint. (Pet. App. 29a-41a). Petitioners themselves, as defendants in state court, elected to challenge the sufficiency of Respondents' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (failure to state a claim upon which relief can be granted). In making that strategic election to seek dismissal at the earliest stage of the litigation, Petitioners admit the truth of each well-pleaded factual allegation of the Complaint. *Jackson v. Carolina Hardwoods Co.*, 120 N.C. App. 870, 463 S.E.2d 571 (1995). Thus, this Court should only look to the Complaint and the three exhibits attached to the Complaint, *i.e.*, the 2 November 2000 Memorandum from the Honorable Howard E. Manning, Jr., the Letter to Roy Cooper dated 2 November 2000, and the Letter to Roy Cooper dated 6 November 2000. Interestingly, Petitioners chose not to include the exhibits attached to the Complaint in their Petition. Respondents, mindful of their obligations to this

Court to provide a fair and full representation of the facts, have attached the exhibits to the Complaint in their Appendix.

After reviewing the Complaint and the exhibits attached to the Complaint, both appellate courts of North Carolina have effectively stated that the Complaint states valid claims for relief in behalf of the law firm and its members for libel *per se* and unfair trade practices. (Pet. App. 1a, 14a).

Since this Honorable Court has used the phrase "a known lie"[2] in analyzing libel cases, the Respondents will also depart from their customary more polite and preferred verbiage and call Petitioners' attack ad just what it is – a known lie.

In addition to rearranging plaintiffs' names and misstating the libelous statements of their attack ad, Petitioners go even further to add copious new and additional facts beyond those to which responses to Rule 12(b)(6) motions are restricted. Additional facts were appropriately not considered in the interlocutory state court decisions now complained of and are inappropriate for a Petition in this Court. Petitioners ask this Court to review a case wholly different from the facts before the state courts.

Petitioners attempt to "improve" the facts of Respondents' Complaint by alleging numerous outside-the-record and contested facts that may or may not be presented to a March 2004 jury trial next year. (Pet. 3, 13, 19 and Pet.

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[2] *Garrison v. Louisiana*, 374 U.S. 64 (1964).

App. 25a-28a). Rules of this Court mandate that Petitioners tell this Court those facts which the three state courts below considered and relied on – not those facts Petitioners hope may be heard at trial. Granting or denying review in this Court should be based only on the factual and legal basis applied by the state courts. The facts stated in the Complaint and its exhibits, are for present purposes in this Court, as was the case in state court below, the *only* facts pertinent for consideration.

RESPONDENTS' STATEMENT OF FACTS

What Petitioners said and did between 31 October 2000 through 7 November 2000 (Election Day) is relatively simple. Petitioner Cooper, his campaign and campaign staff, Petitioner Cooper's fellow defendants, chose to publish day and night for eight days throughout North Carolina and parts of Virginia and South Carolina, false statements cloaked in a television commercial claiming the five Respondents, including their one political opponent, engaged in unethical and unprofessional activities. (Pet. App. 29a-43a). In their attack ad, Petitioners charge that the five Respondents engaged in violations of the North Carolina Rules of Professional Responsibility, in that Petitioners intentionally and falsely citing a *specific* lawsuit by *specific* case number and quoting the *specific* Judge and part of a *specific* court order in that case. (Pet. App. 32a-35a).

Based upon the jurisprudence of this Court, *even a politician* should not cross the threshold of publishing known and deliberate lies against his opponent, especially when third party, non-candidates are the target of the lies.

"Admitted facts" set forth in the Complaint that are pertinent to the Petition (facts admitted for the purpose of determining whether a valid claim for relief is stated) and that are the facts upon which the state courts relied, include the following:

1. Petitioners were involved in a contested election against their opponent, Respondent Dan Boyce. Petitioners possessed polling research that indicated Respondent Dan Boyce was leading Petitioner Cooper in the campaign for the position of North Carolina Attorney General. (Pet. App. 36a).

2. In response to this polling research, eight days before the 7 November 2000 election, Petitioners produced and published statewide a television attack ad attacking their opponent, Respondent Dan Boyce. The ad contained four untrue statements of fact, attacking not only Respondent Dan Boyce, but also members of their opponents' law firm, particularly Respondents Philip and Laura Isley (neither of whom were running for any political office), saying in part:

> **"Dan Boyce – his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers."**
>
> **The source quoted was "Superior Court of N.C. Case No. 95 CVS 6715."**
>
> **"The [Superior Court] Judge said it shocks the conscience."** ("It" being charging clients a fee of $28,000 per hour.)
>
> **Dan Boyce's "law firm wanted more than a police officer's salary for each hour's work."**

(Pet. App. 33a).

3. Respondent law firm was not formed until May, 1999. (Pet. App. 32a). The law firm was not involved in the case cited by court docket number in Petitioners' ads. (Pet. App. 34a). Nor were the candidate and two of other members involved and could not be persons referred in the Judge's quote. Only the candidate's father and a different law firm were. During the days and nights the false statements were still being published, the Judge quoted in the attack ad made available to Petitioners *before the election* and to the media his written statement confirming who the law firm and lawyer referred to in his Order were. (Pet. App. 34a-35a, Resp. App. 1-3). The Judge identified as counsel for taxpayer clients the law firm Womble Carlyle Sandridge & Rice and a sole practitioner, Eugene Boyce. Eugene Boyce, father and father-in-law of the other three Respondents here, years later became a member in Respondent Boyce & Isley, PLLC. *Id.*

4. Respondent Philip R. Isley immediately notified Petitioners of the false portions of the ad. (Resp. App. 3-11). In Respondent Philip R. Isley's letter dated 2 November 2000, Petitioners were told that the attack ad they were televising contained false information about himself and his fellow Respondents. Respondent Philip R. Isley demanded an immediate retraction and an apology. (Resp. App. 3-7). Petitioners did not respond to either the 2 November 2000 letter or the written statement by the Judge but continued publication of the attack ad. A second letter dated 6 November 2000 demanded retraction. (Resp. App. 7-11). After hearing no valid response from Petitioners, Plaintiffs filed this civil action for damages in Wake

County Superior Court on 6 November 2000,[3] the day before the election and before the outcome of the election could be known.

5. Knowingly false statements impugned the professional reputation of Respondents. They were false and defamatory as to persons other than the political opponent – the law firm and its three attorneys that were neither public figures nor political candidates. In order to connect one lawyer who was their political opponent, Petitioners had to lie about a prior lawsuit, lie about the content and context of a Judge's order, lie about the firm's billing practices and lie about the good reputation of Respondent attorneys and their law firm. Three of the lawyers lied about, Respondents Philip and Laura Isley and Respondent Dan Boyce, in addition to Respondent Boyce & Isley, PLLC, had absolutely no connection whatever to Superior Court case 95 CVS 6715 cited in the attack ad, never represented the taxpayer clients cited in the attack ad, were not referred to by the Judge quoted in the attack ad and did not and never have engaged in unethical billing practices. Nor has Respondent Eugene Boyce engaged in unethical, avaricious, and unscrupulous billing of his clients. (Pet. App. 29a-43a).

6. Petitioners' deliberate falsehoods throughout North Carolina and in parts of two neighboring states defamed all five Respondents by claiming the law firm and its lawyers are guilty of unethical billing practices – that

[3] Petitioners continually misrepresent the date in which this lawsuit was filed. Contrary to the assertions in the Petition, this lawsuit was filed on 6 November 2000, by the filing of a Rule 3 Complaint.

they had charged clients at the rate of $28,000 an hour, indisputably a violation of Rule 1.5, N.C. Rules of Professional Conduct. The defamatory ads also charged that Respondents were "charging $28,000 an hour in lawyers' fees to the taxpayers" and "more than a police officer's salary" in Case No. 95 CVS 6715. (Pet. App. 29a-43a).

7. Respondents Boyce & Isley, PLLC, Eugene Boyce, Philip R. Isley and Laura B. Isley were not at the time "public figures." Respondent Dan Boyce, the opposing candidate, on the other hand was a public figure. Standards of proof and legal principles differ as among the five Respondent plaintiffs. The Court of Appeals correctly applies federal standards of constitutional law to the "admitted facts" set forth in the Complaint.

JURISDICTION IS LACKING

Petitioners incorrectly assume this Court has jurisdiction "in the midst of ongoing litigation" in the state trial court where discovery and pre-trial procedures are in progress. At the time of the state court appellate proceedings only a single pleading had been filed – Respondents' Complaint.

None of the criteria suggested in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) are present here. Petitioners do not state a federal issue arising from a final judgment or decision of the state courts.[4]

[4] See also, *Nike, Inc. v. Kasky*, 123 S.Ct. 2554 (2003) (Petition improvidently granted).

Granting the most liberal analysis to requirement of "finality" under 28 U.S.C. §1257, Petitioners fail to meet the required burden. The state courts below hold only that Respondents must now go forward with the burden of proof on allegations of their Complaint. Respondents not only must now prove the intentional lies they allege but, more importantly, they must overcome twenty-three (23) affirmative defenses Petitioners pleaded in their recently filed Answer. If the general denial or any one of the affirmative defenses succeeds, this matter will conclude in Petitioners' favor. Thus, Petitioners must admit that today they still have twenty-four (24) "non-federal ground" opportunities to prevail on the merits of this case.

An opinion of this Court on how much constitutional protection a political candidate shall be given in untruthfully attacking the professional reputation of his opponent's family members, business associates and non-political third parties in last minute and desperate negative attack ads is neither salutary to the public interest nor will a new rule add substance to the body of federal or state jurisprudence. In fact, granting the Petitioner candidate and his staff further license to lie in their currently ongoing 2004 campaign will add nothing to the dignity, importance and respect the public is entitled to experience in our democratic processes.

Lastly, Petitioners do not even argue, as it would be feckless to do so, that a refusal of this Court to review the state court decision "might seriously erode federal policy." If Petitioners' conduct is proven to be true, it will demonstrate that sufficient erosion to the political process is caused by them, not by decisions of the Courts. Not one of

the *Cox* criteria are met and jurisdiction does not lie with this Court.

OTHER REASONS TO DENY PETITION

Respondents concede that a candidate like Respondent Cooper and his campaign staff who, if so inclined, are free to exaggerate, misconstrue, cast aspersions, personalize, draw unfair inferences, slur, use hyperbole, overstate, understate, negatively attack and attack with gross distortions his or their opponent in order to win public office and gain public employment. Although a "good name is to be chosen rather than great riches," every unscrupulous politician also knows his or her opponent must have great riches to spend to defend their good name and reputation against defamatory campaign ads. Those candidates with hundreds of thousands of dollars for television advertising and who have no scruples against lying will fill our government offices. Candidates with less money, or more importantly candidates left with no time to defend himself or herself though imminently qualified for public office, will simply quit trying. Many already have.

A single constraint, however, does exist. A politician cannot lie. Absent such impunity, elections will devolve to even lower and more contemptible processes with respect to campaign advertising. As this Court instructs: "[t]he use of a known lie as a tool is at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*,

374 U.S. 64, 75 (1964). Later, this Court said "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Dr. Oliver Wendell Holmes many years before said it equally well: "[s]in has many tools, but a lie is the handle which fits them all." Oliver Wendell Holmes, *The Autocrat of the Breakfast-Table* 124 (Common Reader ed., Akadine Press 2001) (1858).

Since 1931, North Carolina law in its "Corrupt Election Practices Act" draws the same bright red line this Court has pronounced more than once. N.C. Gen. Stat. § 163-247 makes it a criminal act:

* * *

> (8) For any person to cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

The civil common law of defamation of North Carolina has also been consistent throughout the legal history of this State. North Carolina has a Constitution with a "Declaration of Rights" – enacted thirteen years before the federal "Bill of Rights" and its First Amendment. North Carolina respects, assures and enforces the right of its citizens to "speak their mind." But lying is not a right granted nor an act protected by either Constitution. This is especially true of lies against third parties and commercial entities not holding themselves out for election to a public office.

CONCLUSION

If this Court wishes to examine its prior decisions and reconsider whether deliberate lying has risen to the status of a permissible tool for Petitioners and other politicians to use in last minute and desperate, negative campaign tactics against their opponent and third-party business associates in the democratic election processes of our governments, the Petition should be granted. Otherwise, it should be denied.

Respondents submit the federal and state laws and Constitutions liberally cast the doors quite wide open for robust political rhetoric. We further submit that lying political candidates in our democratic republic, even in the hottest political race, need to feel the cool winds of honesty, propriety and decency blow across their furrowed brows.

Respectfully submitted, this 18th day of September, 2003.

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CHAMBERS OF SUPERIOR COURT
JUDGE HOWARD E. MANNING, JR.
10th Floor of Wake County Courthouse
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Raleigh, North Carolina 27602

November 2, 2000

Re: *Donald L. Smith, et al. vs. State of North Carolina, et al., 95 CVS 6715, Wake County ("Smith Intangibles Tax Case")*

Relevant Procedural History

This action was instituted on July 7, 1995, for the purpose of obtaining refunds of intangibles taxes paid for the years 1991 through 1994 to the State of North Carolina. On June 11, 1997, this Court entered Final Judgment in the Smith Intangibles Tax Case. This Judgment directed the Department of Revenue to refund, principal and interest, to all taxpayers in Class A (all taxpayers who had paid in the intangibles tax in any year from 1991 through 1994 and who had protested the payment of the tax pursuant to Section 267. The Court dismissed the claims of the Class B taxpayers, those who had paid but not protested under Section 267. The Class Counsel (the lawyers) for the Class A taxpayers (protestors) and Class B taxpayers (non-protestors) were the law firm of Womble Carlyle Sandridge and Rice ("Womble Carlyle) and Eugene Boyce, then a sole practitioner.

On June 10, 1997, Womble Carlyle and Eugene Boyce filed a Petition for Attorney's fees and expenses for the work done on behalf of the Class A taxpayers. In their Petition, Womble Carlyle and Eugene Boyce advised the Court that they were seeking 16% of the recovery for Class A, a fee which would exceed $23,000,000.

On August 8, 1997, the Court held a hearing on Womble Carlyle and Eugene Boyce's petition for attorney's fees and expenses. Thereafter, the Court took the matter under advisement so it could review the records, time records of counsel and decide the fee petition.

On November 20, 1997, this Court entered a lengthy Memorandum of Decision and Order in which the Court denied Womble Carlyle and Eugene Boyce's petition for $23,000,000 in attorney's fees and instead, allowed Womble Carlyle and Eugene Boyce a total of attorney's fees and expenses amounting to $1,691,000, of which attorney's fees and expenses paid by the Fulton plaintiffs in a related suit would be refunded.

The only lawyers involved in this case through November 21, 1997, were lawyers from Womble Carlyle and Eugene Boyce, then a sole practitioner. The Court's Memorandum of Decision and Order on the denial of the $23,000,000 attorney's fee request is of public record in Wake County. There was no appeal from the Court's Memorandum of Decision and Order.

/s/ HEM
Sup. Ct. Judge
11/2/2000

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November 2, 2000

VIA FACSIMILE – 835-1228

Mr. Roy Cooper, III
Campaign Headquarters
Raleigh, North Carolina

Dear Mr. Cooper:

We have reviewed the political ad that you sponsored and authorized beginning October 31, 2000. Attached is a copy of a transcript of the ad.

This firm and its members demand that you withdraw all authorization of the continued publication of the information you are reporting. We further demand that you correct the false information.

Your political ad violates North Carolina General Statutes, §163-274(8), §163-272-1, §163-276, and §§99-1-2. Ironically, our recollection is you participated in the adopting of these laws that you now violate.

Among other things, the specific false statements you and, with your funds, the media are propagating include:

1. The case you refer to, "Superior Court NC, Case No. 95 CVS 6715" ("the *protestor* intangibles tax case")

was begun in May 1995 and concluded in November 1997. At the time the *protestor* case was concluded, Dan Boyce had his own law firm, the Boyce Law Firm. Boyce & Isley, PLLC was not formed until more than a year after the *protestor* intangibles tax case was concluded. Dan Boyce, the Boyce Law Firm and Boyce & Isley, PLLC have never been involved in the *protestor* intangible tax case.

2. The case from which you derive your false accusations is not a case in which Dan Boyce ever participated. The case quoted in the television ad, Wake County Superior Court Case number 95 CVS 6715, is the *protestor* intangibles taxpayers case. The Judge quoted is the Honorable Howard E. Manning, Jr. The quote "shocks the conscience" was made in an Order entered by Judge Manning on November 21, 1997. Once again, Dan Boyce, the Boyce Law Firm and Boyce & Isley, PLLC, have never been involved with the *protestor* intangibles taxpayer case.

3. The November 21, 1997 Order also refers to a fee that is "more than a teacher's salary," which you obviously changed to read "a police officer's salary" for the purpose of aggrandizing yourself in this particular political race. Your efforts to modify the written Order to suit your political needs not only places Dan Boyce in a false light, but it also puts Judge Manning and his Order in a false light.

4. The reference you make to an alleged hourly charge of $28,000.00 also comes from the 1997 Order entered in the *protestor* intangibles taxpayer case. The hypothetical number created by Judge Manning in his November 21, 1997 Order is $28,174.00. His fee award was less than 1.5% of the recovery of $150,000,000.00.

5. To help you and all parties know the true facts, which can easily be determined with a minimum of due diligence, the cases Dan Boyce and this law firm are involved in are limited to (a) the Bailey/Emory/Paxton cases (92 CVS 10221, *et al.*) and (b) the *non-protestor* intangibles taxpayer case (98 CVS 00625) known as the "Shaver case" consolidated by Judge Manning with the "Smith B" *non-protesting* taxpayers. This consolidated case is known as the "Smith/Shaver" case. As you are certainly aware (as you participated in the legislation appropriating the settlement monies), these cases were settled with the State for $799 million and $440 million, respectively. These are the only two cases this firm has and is handling and about which Dan has spoken.

Mr. Cooper, a fundamental lesson learned in the first year of law school is to correctly identify a case name, the facts of the case and the holding of the case. You failed to even meet this standard. A simple alternative for you would have been to simply go to the courthouse and look closely at the official case record. A second alternative for you would have been to check with Judge Manning about the veracity of your charges. In fact, we spoke with Judge Manning about your accusations and falsehoods levied at Dan. We are confident, and the record supports our contention, that Dan Boyce had no involvement whatsoever in the *protestor* intangibles taxpayer case.

It is patently obvious that neither your nor any of your staff performed an investigation about the material you have placed in the public record. As you are still a licensed North Carolina attorney, we can only conclude that your published derogatory report is being done in reckless disregard of its truth or falsity. We feel that it is necessary to point out to you that such statements made

in reckless disregard of the truth could result in your removal from office should you be elected as Attorney General. The applicable statute specifically states that:

> "[a]ny public official who shall be convicted of violating any provision of Article 13 or 22 of this Chapter, in addition to the punishment provided by law, shall be removed from office by the judge presiding, and if the conviction is a felony, shall be disqualified from voting until his citizenship is restored as provided by law." *N.C.G.S. §163-276.*

We are personally (and professionally) disappointed in your conduct. Frankly, your reckless actions and your blatantly false television ads emphasize why North Carolina needs an attorney general that is more concerned about the law instead of politics. We had hoped that the Attorney General's race would set the standard for positive campaigning. However, just like every other politician, you have opted to travel the contemptible path of negative politics. We trust that you will take the appropriate and legally mandated actions to correct your false television ads.

Sincerely yours,

Boyce & Isley, PLLC

/s/ Philip R. Isley
Philip R. Isley

Enclosure
C: North Carolina Board of Elections
(*via* facsimile w/encl.)
PRI/ms

Voice: **Visuals:**

I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.

Voice Over:

Roy Cooper, endorsed by every major police organization for his record of tougher crime laws.

ENDORSED BY EVERY
MAJOR POLICE
ORGANIZATION
ROY COOPER

Dan Boyce – his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.

Sued the State

CHARGED $28,000/HOUR TO
TAXPAYERS
Source: Superior Court of NC
Case No. 95 CVS 6715

The Judge said it shocks the conscience.

IT SHOCKS THE CONSCIENCE

Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.

MORE THAN A POLICE
OFFICER'S SALARY

Dan Boyce, wrong for Attorney General

DAN BOYCE
WRONG FOR
ATTORNEY GENERAL

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November 6, 2000

VIA FACSIMILE – 835-1228

Mr. Roy A. Cooper, III
Campaign Headquarters
Raleigh, North Carolina

Dear Mr. Cooper:

You have ignored our November 2, 2000 letter wherein we demanded that you correct the false and misleading information that you and your campaign are publishing statewide. We had hoped you would take our advice and remove all false advertisements from statewide publication. Since you continue to sponsor and publish these false statements of material fact about this law firm and Dan Boyce, our choices are to either allow the falsehoods continue to damage this firm or correct the public record. We are writing this letter before the election so that no one can say that salt is being "rubbed in your wounds" if Dan Boyce wins or that this action is "sour grapes" if he does not win. Our interest lies in the good reputation of this law firm and in fair, honest, and decent political campaigning.

It is truly unfortunate that you choose to ignore our reasonable requests to correct the public record. Your cavalier, "win at all costs" attitude about these false and misleading ads have strengthened our resolve to make sure the public knows exactly what the facts are in the court orders you quote from in your ads. Attempting to impugn members of Boyce & Isley, PLLC with your false and misleading ads steps far over the bounds of lawful and ethical conduct. As an attorney and a candidate for the top legal job in this State, you should *absolutely* know better than to publish such false and misleading ads against the members of this firm.

It is only fair that we inform you that a lawsuit will be filed against you, your campaign, members of your campaign staff and anyone else associated with preparing the false and misleading ads. Our claims for relief will include, *inter alia*, 1. Civil Conspiracy to violate N.C.G.S. § 163-274, *et seq.*; 2. Libel and Slander *Per Se*; and 3. Unfair and Deceptive Trade Practices. In addition to the other damages we are entitled to, we will be seeking a public retraction of the false and misleading ads and formal apology from all named defendants.

So as not to embarrass you or your staff before the election, a Rule 3 action will be filed with the Court. To further show our good faith, we are not going to alert any media about the filing of this action before the election. We will also seek early discovery under Rule 30 in order to establish an accurate record in preparation of a formal complaint and claims for relief. Information sought in discovery will include all information reviewed by you prior to creating and sponsoring the false and misleading ads, all drafts and final text of the ads you have prepared and sponsored (whether published or not), all names and

the statements of individuals advising you to publish the false and misleading ads, and anything else discoverable under the Rules of Civil Procedure. At this time, we plan to depose you, your communications and research manager, your field director and your campaign manager. When we obtain our order allowing for early discovery, we will notify all named defendants of the time and date of the depositions.

We have researched our legal position since the false and misleading ads have been published. We are most comfortable with the established facts contained in the public record and legal basis behind our actions. In fact, regardless of the outcome of the election, we are going to pursue these claims to set the record straight.

After reading this letter, should you decide to change your position with regard to your false and misleading ads, you may issue a written, public apology to this firm and Dan Boyce for airing ads and "standing behind them" as truthful ads. You should also send a copy of the public apology and retraction to the radio, television and print media around the state. As a component of your written apology, you will retract the ads in each and every media outlet that is running the ads. If you do this by 4:30 p.m. *today*, our efforts to set the record straight will be accomplished. We will, thereupon, not proceed with the lawsuit that is prepared and ready to file.

The damage by your false and misleading ads has been done. The ads have taken a toll in our firm's business as well as in this election. It is not too late for you to correct, for our firm's sake, the wrong that you know exists. We are not unreasonable people and if you correct the wrong, we assure you that nothing more will come of

this – regardless of the election results. It is time you took the high road on this issue. If you decide to do the right thing, you may fax me a copy of your written apology to this office before 4:30 p.m. Otherwise, we are going to have to protect our reputation and the public's interest in open and honest campaigning.

Sincerely yours,

Boyce & Isley, PLLC

/s/ Philip R. Isley
Philip R. Isley

pri/ms